

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LINWOOD S. PARKS,
Appellant,

v.

SMITHSONIAN INSTITUTION,
Agency.

DOCKET NUMBER
DC07528810345

DATE: DEC 28 1988

Ronald Steven Douglas, Esquire, Washington, D.C., for
the appellant.

Nancy L. Johns, Washington, D.C.. for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

The appellant appealed to the Board's Washington Regional Office from his removal from the position of Gardener at the National Zoological Park. The administrative judge dismissed the appeal for lack of jurisdiction because the appellant had elected to utilize the negotiated grievance procedure. For the reasons set forth below, the Board DENIES the appellant's petition, and REOPENS this case on its own motion under 5 U.S.C. § 7701(e)(1). The

initial decision is AFFIRMED as MODIFIED by this Opinion and Order.

BACKGROUND

The appellant was removed from his position effective June 20, 1986. In the agency's letter of decision, the appellant was advised that he could appeal the removal action through the negotiated grievance procedure or to the Board, but not both. See Agency File, Tab 4i. The appellant invoked the grievance procedure under the collective bargaining agreement, and contended that he had been the subject of discrimination based on physical handicap, race, and sex. *Id.* at 4e and 4g. In a step-three decision dated September 30, 1986, the agency denied the grievance and sustained the removal action. *Id.* at Tab 4a. The appellant did not file for arbitration.

In his appeal to the regional office dated April 15, 1988, the appellant stated that he was ill and confused about what rights were available to him, and that he had a permanent disability which affected him mentally and physically. See Appeal File, Tab 1 and 4. In his initial decision, the administrative judge found no evidence of mental incapacity and noted that under 5 U.S.C. § 7121(e)(1), an employee may elect either to grieve or to appeal a matter which is covered by 5 U.S.C. § 7512, e.g., a removal. Since the appellant elected to utilize the negotiated grievance procedure, the administrative judge found that the appellant was precluded from pursuing his

appeal with the Board and dismissed it for lack of jurisdiction.

In his petition for review, the appellant claims that his case should be heard by the Board because he is entitled to a review of the termination decision; that he was not adequately informed of his rights of appeal; that the agency did not fully consider his job-related injury; and that he was handicapped. The agency has responded in opposition to the appellant's petition for review.

ANALYSIS

We concur in the administrative judge's conclusion that the Board lacks jurisdiction over this appeal both for the reason cited by the administrative judge and for the additional reason explained below. The administrative judge correctly found that the appellant elected to file a grievance, and, therefore, he was precluded from filing an initial appeal of his removal to the Board under 5 U.S.C. § 7121(e)(1). See *Morales v. Department of Justice*, 31 M.S.P.R. 167, 170 (1986), rev'd on other grounds, 823 F.2d 536 (Fed. Cir. 1987). See also Initial Decision at 1 n.1. Because, however, the appellant filed a grievance alleging discrimination, he could be entitled to Board review of the grievance decision under 5 U.S.C. § 7121(d).¹

¹ In such an appeal under 5 U.S.C. § 7121(d), the Board or its designee serves as the administrative judge. See 5 C.F.R. § 1201.157.

Section 7121(d) provides:

An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both....Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board.... [Emphasis supplied.]

See also *Robinson v. Department of Health and Human Services*, 30 M.S.P.R. 389 (1986), recon. denied, 31 M.S.P.R. 479; *Ogden Air Logistics Center v. American Federation of Government Employees*, 6 M.S.P.R. 630 (1981).

The Board may review a grievance decision when three conditions are met: (1) the subject matter of the grievance is one over which the Board has jurisdiction; (2) the grievant alleges discrimination as stated in 5 U.S.C. § 2302(b)(1) in connection with the underlying action; and (3) a final decision has been issued. See 5 U.S.C. § 7121(d). See also *Fierro v. Department of the Treasury*, MSPB Docket No. HQ71218810005 at 5-6 (August 31, 1988); *Hardison v. Department of the Treasury*, 13 M.S.P.R. 175, 176 (1982). Because the appellant was removed from his position and alleged discrimination, the first two conditions have been established. We find, however, that the appellant has failed to establish that a final grievance decision was

issued.

The final decision rendered pursuant to a negotiated grievance procedure, which is then appealable to the Board under 5 U.S.C. § 7121(d), is the arbitrator's decision in cases where the grievance procedure provides for arbitration as the last resort. See *Clark v. Equal Employment Opportunity Commission*, 31 M.S.P.R. 455 (1986). See also *Fierro*, MSPB Docket No. HQ71218810005 at 6; *Ogden Air Logistics Center*, 6 M.S.P.R. at 635. The applicable negotiated agreement provides, at Article XXI, Section 7, for the invocation of arbitration if the grievance is not resolved at step three. See Agency File, Tab 4u. The record does not reflect, nor does the appellant allege, that he pursued his grievance through arbitration. Thus, a final decision within the meaning of section 7121(d) was not rendered. See *Clark*, 31 M.S.P.R. at 457. Cf. *Gillman v. Department of the Navy*, 7 M.S.P.R. 299, 301 (1981) (grievant did not exhaust administrative remedies under the negotiated grievance procedure prior to petitioning the Board for review). The appellant's request, therefore, is not ripe for adjudication by the Board. *Clark*, 31 M.S.P.R. at 457.

Accordingly, the Board finds that the appellant's case is not within the purview of its jurisdiction either as an original appeal from the removal action or as a request for

review of the grievance decision.² See 5 U.S.C. §§ 7121(d), (e); 7702. See also *Clark*, 31 M.S.P.R. at 457; *Garland v. Department of Labor*, 13 M.S.P.R. 629, 631 (1982).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439


The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you

² We have not considered the timeliness of the request for review of the grievance decision. See 5 C.F.R. § 1201.154(b) (the employee may request the Board to review the final decision within twenty days after receipt of the final decision). See also *Stickles v. Veterans Administration*, 31 M.S.P.R. 264, 267 n.6 (1986), *aff'd*, 824 F.2d 980 (Fed. Cir. 1987) (Table).

personally, whichever receipt occurs first. See 5 U.S.C.
§ 7703(b)(1).

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board